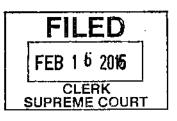
COMMONWEALTH OF KENTUCKY SUPREME COURT OF KENTUCKY 2015-SC-000094-D



KENTUCKY RETIREMENT SYSTEMS

APPELLANT

V.

On Appeal from the Kentucky Court of Appeals Case No. 2013-CA-000309

DIANNE CARSON

APPELLEE

REPLY BRIEF FOR APPELLANT

Respectfully submitted,

KENTUCKY RETIREMENT SYSTEMS

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CERTIFICATE OF SERVICE PURSUANT TO CR 76.12(6)

I hereby certify that a true and accurate copy of the foregoing Reply Brief for Appellant has been mailed, postage prepaid, on this the 16th day of February, 2016 to: Hon. Michael P. Sullivan, Hon. Elizabeth A. Coleman, Sullivan Law Office, 1500 Story Avenue, Louisville, Kentucky 40206; Hon. Phillip J. Shepherd, Judge, Franklin Circuit Court, 222 St. Clair Street, Frankfort, Kentucky 40601; and Hon. Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601. I further certify that the Record on Appeal, from the Clerk of the Court of Appeals, was not withdrawn by counsel for Appellant.

COUNSEL FOR APPELLANT

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REPLY

A. The Appellee Failed to Properly Preserve Res Judicata for Judicial Review.

Appellee profoundly relies on pleadings filed prior to the hearing officer's recommended order as the predicate to her assertion that she properly preserved *res judicata* for further review under KRS Chapter 13B. As such, certain clarifications are required with respect to Appellee's Counterstatement of the Case. Appellee states to this Court that:

A hearing was held on October 10, 2010. Thereafter the parties submitted their respective Position Statements, in which the Appellant argued against res judicata being applicable to the case. The parties then submitted Reply Statements, again with Appellant's arguments opposing the application of re judicata. The hearing officer issued his Report and Recommended Order recommending denial of the application on March 21, 2011. Claimant, Appellee, filed her Exceptions incorporating her arguments she made in her Position and Reply Statements.

Kentucky Retirement Systems is the designated Appellant in this review and certainly did not argue in opposition of *res judicata* before the hearing officer. It appears that the Appellee may have simply mistakenly supplanted the words "Appellant" and "Appellee" in the above passage from her Counterstatement of the Case. More importantly, the statement that Appellee's Exceptions incorporated the prior arguments from her Position and Reply Statements warrants further explanation. Nowhere in Appellee's Exceptions to the hearing officer's recommended order are the words "*res judicata*" recited nor any argument advanced that the hearing officer erroneously applied *res judicata* resulting in a tainted recommendation to deny disability retirement benefits under KRS 61.600. Appellee's Exceptions are found in the administrative record on appeal, pages 682 through

¹ See 2015-SC-000094-D, Brief for Appellee, page 3 (internal citations omitted)(Emphasis added).

685. These Exceptions are void of any claim of error with the hearing officer's application of res judicata. The recommended order very clearly states that the hearing officer found himself "bound by the findings of the Board of Trustee's Report and Order as to all evidence considered in the course of the first application concerning Claimant's job and condition(s)."2 Appellee's Exceptions do not challenge this ruling.3 Similarly, the hearing officer's Finding of Fact No. 9 embodies application of res judicata with respect to past claims of cardiac incapacity "based on the previous decision of the Board of Trustees and a review of the medical evidence submitted with the current application." Appellee did not object to this finding nor take exception to the clear application of res judicata. Again, in Finding of Fact No. 11, the hearing officer applied res judicata when holding that "the fatigue that Claimant suffers as a result of her heart condition was considered by the Board of Trustees in the denial of Claimant's first application" and "based on the previous findings of the Board of Trustees and a review of the medical evidence submitted...."5 Appellee alleged no error in her Exceptions to this finding applying res judicata. Simply stated, while taking specific exception to credibility and residual functional capacity determinations, not once does Appellee allege in her Exceptions that the hearing officer's recommendation was fatally flawed by application of res judicata. Thus, while the Counterstatement of Facts before this Court states "Appellee filed her Exceptions incorporating her arguments she made in her Position and Reply Statements," supra, it should be underscored that, as pertaining to res judicata, the sum total of that argument in

² (A.R., p. 662).

³ (A.R., pp. 682 – 685).

⁴ (A.R., p. 677).

⁵ (A.R., pp. 678-679).

⁶ (A.R., p. 684).

the Exceptions were the three words "incorporates by reference". The Court of Appeals' published opinion did not rectify Appellee's preservation error(s).

Appellee now asks this Court to adopt an entirely new standard for issue preservation. Appellee requests the rule of law be amended so that the blanket insertion of the words "incorporates by reference" in Exceptions is itself sufficient to preserve all claims for further review under KRS Chapter 13B. This is not the law, nor should it be for sound reason. To adopt Appellee's theory would require a court, within the multitude of agency challenges filed (running the gamut from disability appeals (KRS) to liquor license denials (ABC)), to comb through the pleadings of an administrative record rather than examining a single succinct Exceptions document specifically identifying those portions of the hearing officer's findings, conclusions, and recommendation alleged to be incorrect, and why. This proposed new standard is not feasible and the opposite has been required of the courts. (See Givens⁸ involving a pro se litigant who timely filed Exceptions but were deemed too generalized and insufficient to warrant additional judicial review, and Kroger9, in which the attorney tendered Exceptions with twelve numerical paragraphs of objections to the hearing officer's recommendation were nonetheless determined to be too vague and "tantamount to having filed no exceptions at all" for purposes of issue preservation.) This Court should reject Appellee's request for a new standard on issue preservation and reaffirm the general rule of law that specific Exceptions objecting to a recommended order are obligatory to preserving those arguments for later judicial review. 10

⁷ See Appellee's Exceptions. (A.R., pp. 682-685).

⁸ Givens v. Com., 359 S.W.3d 454, 461 (Ky. App. 2011).

⁹ Kroger Ltd. Partnership v. Cabinet for Health and Family Services, 2007 WL 4553667 (Ky. App.). A copy included in the Appendix to the Brief for Appellant and cited under C.R. 76.28(4).

Givens v. Com., 359 S.W.3d 454, 461 (Ky. App. 2011) citing Collins v. Conley, 288 S.W. 316 (Ky. 1926)(emphasis added).

Appellee also asserts, despite her limited exceptions, the Board of Trustees was on adequate notice from past arguments raised that she would object to res judicata if utilized in the recommended order. In support, Appellee references this Court's 2011 Fischer opinion and argues "the Hearing Officer and the Board of Trustees had ample notice that res judicata was at issue in Carson's reapplication for benefits, as contemplated by Fischer v. Fischer, Ky., 348 S.W.3d 582 (2011)." 11 Nothing in Fischer dispenses with the Exceptions requirement in KRS 13B.110(4). Fischer does not open the door to appellate review of unpreserved claims but instead reaffirms the "gatekeeper" preservation requirements compulsory to future judicial review. In fact, Fischer was cited in a recent Kentucky Retirement Systems disability appeal rejecting unpreserved claims for review. In Faulkner v. Kentucky Retirement Systems, 12 the Court of Appeals refused to entertain a disability appeal underscoring the two criteria necessary to preserve alleged errors were not met. First, the claim must have been preserved through specific Exceptions to the recommended order at the agency level. Second, that same claim must continue to be advanced in the lower reviewing court. The Court of Appeals explained:

We further note that Faulkner failed to preserve those issues by properly raising them in both her Exceptions to the hearing officer's "Findings of Fact, Conclusions of Law, and Recommended Order," and 13 in her appeal to the circuit court. ... "Under Chapter 13B, the filing of exceptions provides the means for preserving and identifying issues for review by the agency head. In turn, filing exceptions is necessary to preserve issues for further judicial review." Rapier v. Philpot, 130 S.W.3d 560, 563 (Ky.2004). Since the Disability Appeals Committee adopted the hearing officer's "Findings of Fact, Conclusions of Law, and Recommended Order" with

¹¹ See 2015-SC-000094-D, Brief for Appellee, page 6; Fischer v. Fischer, 348 S.W.3d 582, 588 (Ky. 2011).

¹² 2012 WL 4745169 (Ky. App.), unpublished and cited pursuant to Civil Rule 76.28(4). Attached hereto. ¹³ (Original emphasis).

only minor typographical changes, judicial review by the circuit court was limited to the issues raised in those Exceptions.

In the instant case, while Appellee advanced her claims with the lower reviewing court, she failed to satisfy the first criteria and preserve those claims involving application of res judicata through specific Exceptions at the agency level. It was error for the Court of Appeals to entertain Appellee's res judicata argument and this Court should reverse.

Lastly, Appellee attempts to distinguish the present case from the court's ruling in Kroger Ltd Partnership I v. Cabinet for Health and Family Services¹⁴ arguing "the complaint [against res judicata in the present case] had arisen prior to the Hearing Officer's decision." Kroger is exactly on point striking down identical arguments of notice and preservation of claims from past pleadings before a recommended order was issued. In Kroger, two months prior to issuance of the hearing officer's report, the appellant filed a detailed proposed recommendation and asserted that any portion of the actual recommended order at variance with this prior filing preserved arguments for further judicial review. The court flatly rejected this argument emphasizing that to accept otherwise would in essence dispense with the requirement for filing specific Exceptions under KRS Chapter 13B. The Kroger Court concluded that "our research has not revealed that to be the case." Id. This Court should apply the same logical analysis to the instant case and find that Appellee's prior arguments at odds with the subsequently issued recommended order were not sufficient to preserve the claims for further judicial review.

¹⁴ 2007 WL 4553667 (Ky. App.). A copy is included in the Appendix to the Brief for Appellant and cited under C.R. 76,28(4).

¹⁵ Brief for Appellee, p. 7.

To simply permit boilerplate language "incorporates by reference" would abandon the requirement of specific Exceptions. This is not the law.

B. The Court of Appeals and Appellee Misconstrued the Law of Res Judicata within its application under KRS 61.600.

Noticeably absent from the Court of Appeals' published opinion is any substantive discussion or explanation why it deliberately decided not to follow the preceding body of case law specifically recognizing *res judicata's* place in successive disability claims. No meaningful explanation is provided in the lower court's published opinion justifying its departure from the law, which will almost certainly lead to more confusion for agencies and practitioners alike.

In all fairness, Appellee is now left with the daunting challenge of filling in the noticeable gaps in the lower court's decision and attempts to do so through opining that "each of the three prior Court of Appeals cases [Holland, Hoskins, Howard] is distinguishable or vague in application." The explanation offered understandably falls short of its mark. The decision must be corrected. Hoskins v. Kentucky Retirement Systems made clear that under the same disability provisions as the instant case, "KRS 61.600 allows applicants to refile for disability benefits. In order to do so, however, the applicant must only show that new evidence was presented which would justify the award of disability benefits" and "although a change in condition is not required, the applicant cannot relitigate the same facts and issues under the doctrine of res judicata. E.F. Prichard Co. v. Heidelberg Brewing Co., 234 S.W.2d 486 (Ky. 1950)." The Hoskins court unequivocally concluded that Kentucky Retirement Systems' "Board properly refused to

¹⁶ See 2015-SC-000094-D, Brief for Appellee, page 16.

¹⁷ 2011 WL 112147 (Ky. App.).

¹⁸ Hoskins v. Kentucky Retirement Systems, 2011 WL 112147 (Ky. App.) (Emphasis added).

consider evidence and arguments which were presented in the first application. We find no error in this decision."¹⁹

In response, Appellee now asserts that the Court of Appeals was "aware of" and "rejected" Hoskins.20 A cursory review illustrates that nowhere in this published opinion does it hold that the Hoskins decision applying res judicata to successive disability claims was overturned, overruled, or otherwise bad law. The only explanation offered was that Hoskins does not "compel a different result." In turn, Appellee attempts to theorize the lower court's rationale by arguing that Hoskins relied on a "vintage" 1950's case E.F. Prichard Co. v. Heidelberg Brewing Co.22 that was not an administrative action, had no significant discussion of res judicata and "has absolutely nothing to do" with disability claims.²³ Concerns over E.F. Prichard were not articulated in the lower court's published opinion. Moreover, accepting Appellee's explanation that the lower court was uncomfortable relying upon "vintage" case law from the 1950s does not explain the equal disregard for the recent 2013 Howard decision. 24 There is no reliance upon E.F. Prichard or Hoskins in the Howard opinion reaffirming that "It must also be noted that because this is Howard's second application for benefits, res judicata applies; therefore, we only review the denial of benefits as it relates to the new evidence submitted with the second application."25 Appellee is unable to offer any plausible explanation for the lower court's silent departure from the firm holding in Howard other than to dismiss the opinion

¹⁹ Id (Emphasis added).

²⁰ See 2015-SC-000094-D, Brief for Appellee, page 16.

²¹ Court of Appeals' Opinion Affirming, p. 14.

²² 234 S.W.2d 486 (Ky. 1950).

²³ See 2015-SC-000094-D, Brief for Appellee, page 16.

²⁴ 2013 WL 5603579 (Ky. App.).

²⁵ Id. (Emphasis added).

language as "fleeting" and "an afterthought."²⁶ To the contrary, Kentucky Retirement Systems maintains that the affirmation in *Howard* concisely reiterates the well-established rules of *res judicata* with respect to successive disability applications under KRS 61.600 and its practical bearing on the evidentiary review process. Appellee also argues that *Holland v. Kentucky Retirement Systems*,²⁷ was decided under a prior version of KRS 61.600 and hence inapplicable. The *Holland* Court's application of *res judicata* remains germane to the present case where it was invoked because the claimant did not dispute or challenge the initial determination by means of the appeal process. There the Court held "[B]ecause Holland did not appeal from the Board's order adopting the hearing officer's conclusion, this finding is now *res judicata*." The same is true here.

Appellee also engages in an exercise of statutory interpretation asserting that a liberal construction of KRS 61.600(2) bars application of res judicata. The lower court's published opinion similarly opined that "the legislature, by the language in the statute, had modified the traditional concept of res judicata which would otherwise prohibit the filing of a claim based on the same incapacity." These arguments fail. The plain language of KRS 61.600(2) states "A person's disability reapplication based on the same claim of incapacity shall be accepted and reconsidered for disability if accompanied by new objective medical evidence." Kentucky Retirement Systems followed the exact letter of the law when accepting and submitting for consideration to the medical review board Appellee's "reapplication based on the same claim of incapacity" because it was accompanied by new objective medical evidence. In fact, the language is clear that it was

²⁶ See 2015-SC-000094-D, Brief for Appellee, page 17.

²⁷ 2003 WL 1256710 (Ky. App.). A copy is included in the Appendix to the Brief for Appellant and cited under C.R. 76.28(4).

²⁸ Court of Appeals' Opinion Affirming, p. 14.

compulsory ("shall") and Kentucky Retirement Systems complied with that process. Appellee's application was not turned away, even though the new objective medical evidence demonstrated improvement in her cardiac function when compared to evidence from the first application. However, nothing in KRS 61.600(2) supports Appellee's contention that the application must be evaluated with a "view to changing or reversing."29 Under Appellee's theory, the accompaniment of any new objective medical evidence alongside a successive disability application, relevance notwithstanding, forces the agency to reevaluate its prior findings and conclusions with a view towards reversing its decision and granting a lifetime of disability benefits, without regards to the comprehensiveness and accuracy of the prior determination. Under Appellee's construction, the legislative intent of KRS 61.600(2) is that the submission of even a single "new" doctor's visit note, for example obtaining treatment for a common cold, is sufficient to extinguish an entire factfinder's prior analysis and conclusion upon review of hundreds if not thousands of pages of complex diagnostic and treatment records. Certainly, the legislature would not have intended such an absurd result.

Rather, Kentucky Retirement Systems maintains that the plain language in KRS 61.600(2), permitting reapplication based on the same claim of incapacity if accompanied by new objective medical evidence, does not bar, but rather embodies the tenets of *res judicata*. It precludes re-litigating the "same issue" *a fortiori*, the "same evidence" for a particular claim (permanent incapacity), and narrows the inquiry to whether the "new objective medical evidence" justifies a change from the previous disability determination. That is exactly the process that occurred in the instant case. Amongst the two disability

²⁹See 2015-SC-000094-D, Brief for Appellee, page 14.

applications, <u>all</u> objective medical evidence tendered by Appellee was evaluated. The "reapplication based on the same claim of incapacity" was accepted and submitted for consideration because it was accompanied by new objective medical evidence. A majority of the examiners recommended denial. Appellee was provided the complete spectrum of appeal rights with an opportunity to be heard, present witness testimony and additional opportunity to present new objective medical evidence in support of her claim. The hearing officer acknowledged and adopted the findings and conclusions as pertaining to the old evidence from the first application through application of *res judicata*, which Appellee did not previously challenge by way of exercising her statutory right to appellate review. The hearing officer then independently engaged in an evaluation of the newly submitted objective medical evidence accompanying the second application to determine whether a permanent incapacity existed. It was determined that Appellee was not permanently incapacitated from performing sedentary work.

CONCLUSION

No due process violation occurred. The resulting decision was constitutionally firm. The decision was neither arbitrary nor capricious but represented a correct application of the law supported by substantial evidence and should have remained undisturbed. It was error for the Franklin Circuit Court and Court of Appeals to reverse and remand for additional fact-finding without regard to the well-established doctrine of *res judicata*. This Court is respectfully requested to REVERSE the decision and re-instate the agency's determination.

Respectfully submitted,

COUNSEL FOR APPELLANT

2012 WL 4745169

Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

NOT TO BE PUBLISHED

Court of Appeals of Kentucky.

Peggy FAULKNER, Appellant

٧.

KENTUCKY RETIREMENT SYSTEMS and Board of Trustees of Kentucky Retirement Systems, Appellees.

No. 2011-CA-000847-MR.

Oct. 5, 2012.Rehearing Denied Dec. 3, 2012.Discretionary Review Denied by Supreme Court Sept. 18, 2013.

Appeal from Franklin Circuit Court, Action No. 10-CI-00889; Thomas D. Wingate, Judge.

Attorneys and Law Firms

John H. Gray, Frankfort, KY, for appellant.

Joseph P. Bowman, Frankfort, KY, for appellee.

Before LAMBERT, NICKELL, and TAYLOR, Judges.

OPINION

NICKELL, Judge.

*1 Peggy Faulkner appeals from the "Opinion and Order" of the Franklin Circuit Court upholding the decision of the Kentucky Retirement Systems to deny her claim for disability retirement benefits. After careful review of the record and the parties' briefs, we affirm.

Facts and Procedural History

Faulkner was a member of the County Employees Retirement System with a membership start date of August 24, 1992. She was employed by the Whitley County Board of Education as a special-needs assistant with the county's preschool program until her last day of paid employment on May 22, 2007. Faulkner's job involved working with, supervising, and giving care to three-and four-year-old children.

In July 2007, Faulkner filed an application for disability retirement benefits in which she alleged permanent disability as a result of diabetes, coronary artery disease, anxiety, and depression. Faulkner's application was evaluated by the Kentucky Retirement Systems' Medical Review Board in August 2007, and all three reviewing physicians recommended denial. In July 2008, Faulkner

submitted a second application for disability retirement benefits, but the Medical Review Board again recommended denial.

Faulkner subsequently filed an appeal, and an evidentiary hearing was held on August 20, 2009. Following the hearing, the hearing officer issued "Findings of Fact, Conclusions of Law, and Recommended Order" that extensively set forth the medical evidence presented by the parties and found that Faulkner had not met her burden of proving that she qualified for disability retirement benefits under Kentucky Revised Statutes ("KRS") 61.600.

In a final order dated May 3, 2010, the Disability Appeals Committee of the Systems' Board of Trustees adopted the hearing officer's "Findings of Fact, Conclusions of Law, and Recommended Order" with some minor modifications. Of particular note, the final order provided the following findings of fact:

6. The objective medical evidence does not support Claimant's application for disability retirement benefits. She has failed to show through objective medical evidence that as of the last day of her paid employment and for a period of not less than 12 months therefrom that her conditions would prevent her from performing her job as an instructional assistant. She was not seeking psychiatric treatment as of the last day of her paid employment or any significant treatment for the 12 months thereafter. Dr. Durham's records are inconsistent and unreliable. In one report he indicates Claimant's disability began in August of 2007, after Claimant's last day of paid employment and in another he indicates she was disabled as of her last day of paid employment. Some of the conditions on which he bases this opinion are not those [for] which Claimant claims disability. Claimant was gainfully employed after her last day of paid employment and was seeking employment in the area of child care or clerical work. X This is contrary to her assertion that she could not work around children. She further completed multiple applications and reviews for Unemployment where she indicated she was not disabled and was able to work an 8 hour workday. Shortly after her last date of paid employment, Claimant's duplex scan indicated no stenosis. She recovered, by all reports, from her 2001 heart surgery without incident or problems until after her last day of paid employment. Her nerve conduction studies were normal indicating no neuropathy. Claimant's diabetes has been noted to be poorly controlled, but it is also noted she does not follow her medication management.

*2 7. The claimant did not meet her burden of proving by a preponderance of evidence that her conditions did not pre-exist her membership date. The Medical Review Board raised the issue [of] pre-existing conditions, and once that issue is raised the claimant bears the burden of *dis* proving it. The claimant herein submitted no medical information pertaining to the onset date of her diabetes. (Her cardiac disease has been noted by numerous physicians to be the result of her diabetes.) She recounted a longstanding history of chronic panic attacks. Furthermore, in 2001 she was noted to

have a twenty (20) year smoking history and has been described by her doctors as "morbidly obese" on more than one occasion. These facts, taken together, prove that the issue of pre-existence is a reasonable concern in this particular case. In response, the claimant submitted no medical records whatsoever that predated her membership date. She did state at the hearing that her diabetes began in 1998. However, since she also repeatedly stated on state and federal unemployment forms that she was fully capable of working, her credibility is suspect.

Based on these findings, the Disability Appeals Committee concluded that Faulkner had failed to prove by a preponderance of the evidence that she was entitled to disability retirement benefits under KRS 61.600 or that her allegedly disabling conditions did not exist before her membership date in the Systems. Therefore, Faulkner's claim was rejected.

On June 1, 2010, Faulkner filed a "Complaint and Petition for Review and Appeal" in the Franklin Circuit Court. In support of her claim that she was entitled to disability retirement benefits, Faulkner submitted a one-page brief that provided, in its entirety, as follows:

Pursuant to KRS 61.665 Peggy Faulkner is entitled to retirement disability benefits provided that substantial evidence shows that she has been disabled from performing her former job as a Preschool Instructional Assistant for a continuous 12 month[s] since her last date of paid employment and provided that her disability is not related to conditions that pre-exist her membership date. The attached Report of Examination and Treatment from Dr. William Durbin; the attached Report of Examination and Treatment from the Cumberland River Comprehensive Care Center; and the attached Medical Opinion Re: Ability To Do Work–Related Activities provide conclusive evidence that Ms. Faulkner has indeed been disabled from performing her former job as a Pre-school Instructional Assistant for a continuous 12 month[s] since her last date of paid employment and that her disability is not related to conditions that pre-exist her membership date.

On April 13, 2011, the circuit court entered an "Opinion and Order" affirming the denial of Faulkner's claim for disability retirement benefits. This appeal followed.

Analysis

On appeal, Faulkner presents a number of arguments in support of her contention that the Kentucky Retirement Systems erred in denying her claim for disability retirement benefits. However, preservation issues exist as to all of those arguments, as a result of which we decline to consider them on the merits.

*3 Kentucky Rules of Civil Procedure ("CR") 76.03(8) explicitly provides that "[a] party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion." The only issue raised by Faulkner in her prehearing statement—and, therefore, the only issue that stands before us as potentially reviewable—is: "Did the Retirement Systems apply the correct rule of law to the facts

found in this case?" The other six issues presented in Faulkner's brief were not raised either in the prehearing statement or by timely motion seeking permission to submit the issue for "good cause shown." Consequently, they are not properly before this Court for review. CR 76.03(8); *American General Home Equity, Inc. v. Kestel,* 253 S.W.3d 543, 549 (Ky.2008); *Sallee v. Sallee,* 142 S.W.3d 697, 698 (Ky.App.2004).

We further note that Faulkner failed to preserve those issues by properly raising them in both her Exceptions to the hearing officer's "Findings of Fact, Conclusions of Law, and Recommended Order," and in her appeal to the circuit court. In her Exceptions, Faulkner raised three challenges to the hearing officer's recommended decision: (1) that Kentucky Retirement Systems should not have been allowed to participate in the administrative hearing; (2) that the hearing officer was not qualified to review medical evidence because he/she was not a licensed physician; and (3) that the hearing officer erred in failing to find that she was permanently disabled. "Under Chapter 13B, the filling of exceptions provides the means for preserving and identifying issues for review by the agency head. In turn, filling exceptions is necessary to preserve issues for further judicial review." Rapier v. Philpot. 130 S.W.3d 560, 563 (Ky.2004). Since the Disability Appeals Committee adopted the hearing officer's "Findings of Fact, Conclusions of Law, and Recommended Order" with only minor typographical changes, judicial review by the circuit court was limited to the issues raised in those Exceptions. See id. at 563–64; see also KRS 13B.140; Givens v. Commonwealth, 359 S.W.3d 454, 465 (Ky.App.2011).

Before the circuit court, however, Faulkner submitted a one-page brief that presented only two general contentions: that "conclusive evidence" supported her argument that she was disabled from employment and that her disability was not related to conditions that pre-existed her membership date. Both of these contentions related solely to Faulkner's claim in her Exceptions that the hearing officer had erred in failing to find that she was permanently disabled. As a result, the other issues raised in Faulkner's Exceptions regarding the Systems' right to participate in the administrative hearing and whether the hearing officer had the authority to review medical evidence were effectively abandoned for purposes of appellate review by the circuit court and this Court. See Personnel Bd. v. Heck, 725 S.W.2d 13, 18 (Ky.App.1986).

X 4 As to the issue actually raised in Faulkner's prehearing statement, we note that the statement does not elaborate on the "rule of law" to which Faulkner is referring. Indeed, the question, "Did the Retirement Systems apply the correct rule of law to the facts found in this case?" is so vague as to be effectively meaningless. In her brief, Faulkner clarifies the matter somewhat and contends that "[t]he Retirement Systems failed to apply the correct rule of law to the facts in this case" by improperly applying KRS 61.600(3)(a) in determining whether she had shown incapacity "since [her] last day of paid employment[.]"

However, while this specific argument was—viewing the question generously—arguably presented in Faulkner's prehearing statement, it was not raised beforehand in the circuit court *or* before the Disability Appeals Committee. "If the specific ground complained of on appeal is not given at the trial court, then the movant has failed to preserve his thinking should the trial court rule against him, and there will be no record to establish that the court did not rely on other grounds that might suffice." *Fischer v. Fischer*, 348 S.W.3d 582, 588–89 (Ky.2011). Moreover, the issues actually raised by Faulkner before the circuit court were not similar or broad enough to encompass this new issue. Thus, it, too, is unpreserved for our review. *See id.* at 591.

Faulkner suggests that since the issues raised on appeal involve questions of law, which are generally reviewed *de novo*, this Court can consider them despite a lack of preservation. However, "it is the accepted rule that a question of law which is not presented to or passed upon by the trial court cannot be raised here for the first time." *Hutchings v. Louisville Trust Co.*, 276 S.W.2d 461, 466 (Ky.1954); *see also Fischer*. 348 S.W.3d at 589. "Most simply put, '[a] new theory of error cannot be raised for the first time on appeal.' " *Fischer*, 348 S.W.3d at 588, quoting *Springer v. Commonwealth*. 998 S.W.2d 439, 446 (Ky.1999).

Moreover, preservation issues aside, a cursory examination of the record reveals that the decisions of the Disability Appeals Committee and the circuit court regarding Faulkner's entitlement to disability retirement benefits were supported by the medical evidence. Because the Committee denied relief to Faulkner, who had the burden of proof, the question is whether she presented evidence "so compelling that no reasonable person could have failed to be persuaded by it." *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458 (Ky.App.2003). In considering this question, we must bear in mind that "[i]n its role as a finder of fact, an administrative agency is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses, including its findings and conclusions of fact." *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 519 (Ky.App.1998); see also McManus, 124 S.W.3d at 458. The evidence presented in this case was not so compelling that it demanded an award of disability retirement benefits. Thus, no error occurred in this regard.

Conclusion

*5 For the foregoing reasons, the "Opinion and Order" of the Franklin Circuit Court is affirmed. ALL CONCUR.

All Citations

Not Reported in S.W.3d, 2012 WL 4745169